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IN THE
COURT OF APPEALS OF INDIANA

ACCOUNT RECOVERY, INC.,	)	
	)	
Appellant-Plaintiff/Counter-Defendant,	)	
	)	
vs.	)	No. 55A04-0604-CV-209
	)	
CHRISTINA ZIMMERMAN,	)	
	)	
Appellee-Defendant/Counter-Plaintiff.	)	

APPEAL FROM THE MORGAN SUPERIOR COURT
The Honorable Jane Spencer Craney, Judge
Cause No. 55D03-0503-SC-639

September 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Account Recovery, Inc. ("ARI"), appeals the trial court's refusal to enforce an arbitration award and its judgment in favor of Christine Zimmerman's counterclaim. We reverse.

Issue

We consolidate and restate ARI's issues as whether the trial court committed prima facie error by refusing to enforce the arbitration award.

Facts and Procedural History

On April 15, 2002, Zimmerman tendered a personal check in the amount of $225.00 in exchange for a $200.00 short-term loan from County Bank of Rehoboth Beach, Delaware ("County Bank"). On that same date, Zimmerman signed a loan note and disclosure ("the Note"), which stated that she would make one payment of $225.00 on April 29, 2002. When County Bank deposited the $225.00 check on April 29, 2002, it was returned for insufficient funds.[1]

When Zimmerman failed to respond to a letter regarding the bounced check, County Bank submitted the matter to the National Arbitration Forum ("the NAF"), pursuant to an arbitration clause in the Note. The NAF notified Zimmerman of the claim filed against her and requested notification if she disputed it. Zimmerman completed a form on the NAF's

[1] Zimmerman testified that County Bank's representative told her that she could extend the term of this $200.00 loan by paying $45.00 every two weeks. She claimed that she extended the loan several times but eventually defaulted because the extension fee was suddenly raised to $75.00, an amount that she could not afford to pay. Apparently, there was no written agreement as to the alleged terms of extension. The parties agree, however, that Zimmerman defaulted on the loan, and for purposes of our review, when and how the default occurred is irrelevant.

website and sent copies of two bank statements, which she claimed showed that County Bank illegally attempted to debit her checking account on four occasions. On April 1, 2003, the NAF entered an award of $1,150.00 in favor of ARI.[2] On March 17, 2005, ARI filed suit against Zimmerman and requested that the trial court enforce the NAF's award. On September 2, 2005, Zimmerman filed a counterclaim, alleging that ARI had "altered information on a check" in violation of Indiana Code Section 24-4.5-7-410.[3] Following a hearing on October 25, 2005, the trial court refused to enforce the arbitration award and awarded Zimmerman $2,000.00 on her counterclaim. ARI now appeals.

Discussion and Decision

We first note that Zimmerman failed to file an appellee's brief. We will not undertake the burden of developing an argument for her. *Willard v. Peak*, 834 N.E.2d 220, 223 (Ind. Ct. App. 2005). Also, we will apply a less stringent standard of review in this case. *Id*. In the absence of an appellee's brief, we may reverse the trial court if an appellant establishes prima facie error. *Id*. Prima facie error is defined as "at first sight, on first appearance, or on the face of it." *Id*.

[2] From our review of the record, it appears that at least three parties have pursued this particular claim against Zimmerman at different times. Zimmerman originally signed the Note with County Bank as her lender. The NAF's award, issued nearly one year later, shows Hart Funding Corporation as the claimant. Finally, the plaintiff in the trial court and on appeal is Account Recovery, Inc. To avoid confusion, we will simply refer to Zimmerman's adversary as ARI throughout this memorandum decision.

[3] Indiana Code Section 24-4.5-7.410(e) prohibits lenders making small loans from "[a]ltering the date or any other information on a check or an authorization to debit the borrower's account held as security."

I. Enforcement of Arbitration Award

First, we must determine whether to enforce the arbitration award by determining whether the conflict between the parties fell within their agreement, thereby invoking the agreement's arbitration clause. We apply ordinary contract principles governed by state law to determine whether the parties have agreed to arbitrate a dispute. *Safety Nat'l Cas. Co. v. Cinergy Corp*., 829 N.E.2d 986, 1000 (Ind. Ct. App. 2005), *trans. denied*. Here, it is clear that the nature of the parties' disagreement—Zimmerman's default on the Note and ARI's alleged attempts to collect from her following the default—fell within the scope of the Note's arbitration clause.[4] Therefore, Zimmerman and ARI were required to settle their disagreement through arbitration, and the award in ARI's favor was binding upon the parties.

When Zimmerman failed to pay the award, however, ARI properly sought relief from the trial court pursuant to Indiana's Uniform Arbitration Act, which allows parties to seek judicial review and/or enforcement of arbitration awards. *See* Ind. Code §§ 34-57-2-1 to -22; *Fort Wayne Educ. Ass'n v. Fort Wayne Cmty. Sch.*, 753 N.E.2d 672, 675 (Ind. 2001).

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[4] The arbitration clause states in pertinent part as follows:

> AGREEMENT TO ARBITRATE ALL DISPUTES: You and we agree that any and all claims, disputes or controversies between you and us, any claim by either of us against the other (or the employees, officers, directors, agents, servicers or assigns of the other) and any claim arising from or relating to your application for this loan or any other loan you previously, now or may later obtain from us, this Loan Note, this agreement to arbitrate all disputes, your agreement not to bring, join or participate in class actions, regarding collection of the loan, alleging fraud or misrepresentation, whether under the common law or pursuant to federal, state or local statute, regulation or ordinance, including disputes as to the matters subject to arbitration, *or otherwise*, shall be resolved by binding individual (and not joint) arbitration by and under the Code of Procedure of the National Arbitration Forum ("NAF") in effect at the time the claim is filed.

Appellant's App. at 28 (emphasis in original).

> Judicial review of an arbitration award is extremely narrow in scope. *An award should only be set aside when one of the grounds specified by the Uniform Arbitration Act for vacation of an award is shown.* A party who seeks to vacate an arbitration award under the Uniform Arbitration Act bears the burden of proving the grounds to set the award aside. The role of an appellate court in reviewing an arbitration award is limited to determining whether the challenging party has established any of the grounds permitted by the Uniform Arbitration Act.

Fort Wayne Educ. Ass'n, 753 N.E.2d at 675 (emphasis added).

The grounds referred to in *Fort Wayne* are set forth in Indiana Code Section 34-57-1-17 as follows:

> (1) The award or umpirage was obtained by fraud, corruption, partiality, or other undue means, or the arbitrator showed evidence of partiality or corruption.
> (2) The arbitrator was guilty of misconduct in:
> (A) refusing to postpone the hearing upon sufficient cause shown;
> (B) refusing to hear evidence material and pertinent to the controversy; or
> (C) any other misbehavior by which the rights of any party were prejudiced.
> (3) The arbitrator exceeded the arbitrator's powers, or so imperfectly executed them that a mutual, final, and definite award on the subject-matter submitted was not made.

As ARI points out, Zimmerman failed to establish any of these grounds at trial. In response to ARI's claim, Zimmerman argued that ARI unfairly increased the Loan's extension fee from $45.00 to $75.00, thereby forcing her to default. As for her counterclaim, Zimmerman claimed that ARI attempted unauthorized withdrawals from her bank account, but her bank statements failed to show that ARI was involved in these transactions. After reviewing this evidence on its face, we conclude that Zimmerman failed to present sufficient evidence of impropriety within the arbitration process to warrant disregard of the arbitration award under Indiana Code Section 34-57-1-17. ARI has established prima facie error, and

therefore, we reverse the trial court's judgment and reinstate the arbitration award entered in ARI's favor on April 1, 2003.

Reversed.

BAKER, J., concurs.

VAIDIK, J., concurs with separate opinion.

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VAIDIK, Judge, concurring

I concur with the majority that the arbitration award should be enforced, but I write separately to address the trial court's comments that the Note between Zimmerman and County Bank is "an unenforceable contract because it was illegal ab initio. This is clearly usur[i]ous under Indiana law, and I do not feel that I can enforce it." Tr. p. 16. The trial court indicated that it was concerned that County Bank charged more than "the maximum rate." *Id.*

Judge Baker recently addressed payday lending in Indiana in *Cash in a Flash, Inc. v. McCullough*, 853 N.E.2d 533 (Ind. Ct. App. 2006). Judge Baker discussed the Indiana Supreme Court's opinion in *Livingston v. Fast Cash USA, Inc.*, 753 N.E.2d 572 (Ind.

2001), *superseded by statute*, and the Indiana General Assembly's response thereto:

> In *Livingston*, our Supreme Court considered whether payday loans were subject to, among other things, the caps on finance charges and APRs placed on all consumer loans. Although acknowledging that the legislature may not have had payday loans in mind when enacting the Indiana Uniform Consumer Credit Code, our Supreme Court concluded that payday loans were "nonetheless subject to and controlled by that statute." 753 N.E.2d at 577.
>
> In response to *Livingston*, in 2002 our General Assembly passed legislation specifically designed for payday lenders. Thus, Indiana Code chapter 24-4.5-7 now regulates "Small Loans," including payday loans. Among other things, finance charges on payday loans are now exempt from the caps on finance charges and APRs placed on all other consumer loans. Ind. Code § 24-4.5-7-411.

McCullough, 853 N.E.2d at 536-37 (footnote omitted). Judge Baker added that "[w]e are not at liberty to question the policy considerations that led to the legislation." *Id.* at 537 n.3.

Zimmerman and County Bank entered into the Note on April 15, 2002. Indiana Code § 24-4.5-7-411 was added in 2002 by P.L. 38-2002, Sec. 1, which had an emergency effective date of March 14, 2002. *See* Ind. Code § 24-4.5-7-101. Thus, Zimmerman's payday loan was exempt from the caps on finance charges and APRs placed on all other consumer loans. *See McCullough*, 853 N.E.2d at 536-37. I therefore

concur with the majority.